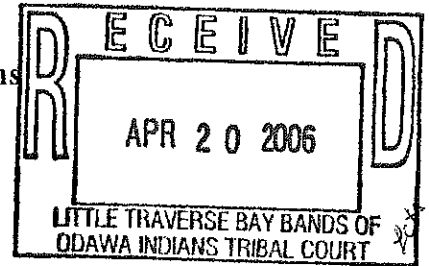


Little Traverse Bay Bands of Odawa Indians
Tribal Court



Albert Carey,
Plaintiff,

V.

Case No: C-062-1005
Hon. Jenny Lee Kronk

Victories Casino,
Defendant.

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**RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND
DISMISSAL**

The threshold issue presented to the court in this matter is whether the Tribal Court has jurisdiction (the authority or power), to hear Plaintiff Albert Carey's claim of wrongful termination. Answering this question is a necessary first step; therefore, this issue must be addressed before the court can proceed.

This proceeding is based upon a claim by the plaintiff that he was wrongfully discharged from his employment at Victories Casino. Defendant Victories Casino argues that this court does not have subject matter jurisdiction because the casino, which is an enterprise of the Little Traverse Bay Bands of Odawa Indians, is immune from suit

because it is protected by tribal sovereign immunity. The defendant further argues that casino employment disputes are to be resolved within the enterprise administration and that such resolution was attempted in this matter. Additionally, the defendant argues that the Whistle Blower Protection Statute (WBPS), Waganakising Odawa Tribal Code, 6.1101 *et seq*, does not allow a cause of action against the Tribe, but only against supervisors and other employees in their individual capacities. Finally, the defendant argues that the plaintiff has failed to state a claim under the WBPS because he has not alleged the reporting of any activity which would constitute a violation of any law.

FINDINGS OF FACT

On September 21, 2005, Defendant Harlan Eckholm told Plaintiff Albert Carey that he was terminated from casino employment because of sexual harassment, insubordination, violation of employee procedures, slander of upper management, and release of in-house confidential information.

Mr. Carey believes he was terminated because he reported to a tribal council member that casino management was losing revenue by paying out too much money in its rewards program as a result of its failure to adequately test the program system.

At an Employee Review Board hearing on September 30, 2005, the plaintiff was asked to sign a confidentiality statement pursuant to the Review Board Hearing guidelines described in the Employee Review Board packet. See, Victories Casino Employee Handbook, §6, revised August 6, 2004.

The plaintiff refused to sign the confidentiality statement prior to the beginning of the hearing, even though he was told that the meeting could not continue if he did not sign the document.

CONCLUSIONS OF LAW

Sovereign Immunity

The inherent sovereign immunity of Indian tribes is well-established and has long been recognized in the law. See, *Santa Clara Pueblo v Martinez*, 436 US 49 (1978), and *Oklahoma Tax Comm v Citizen Band of Potawatomi Indian Tribes of Oklahoma*, 498 US 505 (1991). The United States Supreme Court has consistently held that Indian tribal governments have sovereign immunity unless such immunity has been expressly waived by either Congress or the particular tribal government. See, *Santa Clara*, p 58. It is federal law that provides the parameters for tribal sovereign immunity. See also, *Kiowa Tribe of Oklahoma v Manufacturing Technologies*, 523 US 751 (1998).

Tribal sovereign immunity also applies to subordinate enterprises, like Victories Casino, that are owned by tribes. The cases involving subordinate tribal enterprises have all restated the long-standing principle that without Congressional approval, tribes are immune from suit, and, therefore, subordinate enterprises are also immune. See, *Morgan v Colorado River Indian Tribe*, 443 P2d 421 (1968) and *White Mountain Apache Indian Tribe v Shelley*, 480 P2d 654 (1971). In this case, it is undisputed that defendant Victories Casino is a subordinate tribal enterprise; therefore, it enjoys the immunity protections of the tribe. See, *Lochar v Victories Casino*, LTBB T Ct, No C-022-1200 (February 11, 2002).

Congress enacted the Indian Civil Rights Act (ICRA) in 1968. It has been argued by some that this federal law allows persons certain rights against an overly-intrusive tribal government, and ICRA is, in effect, a Congressional waiver of tribal sovereign

immunity. However, while ICRA created rights, its remedies are limited. The United States Supreme Court in *Santa Clara* decided that Congress only intended *habeas corpus* relief because that was the only relief expressly created. Tribal courts must provide consistent interpretation of the federal statute:

It would be a contradiction of *Santa Clara* to hold on the one hand that the Indian Civil Rights Act is ineffective to waive tribal sovereign immunity by implication in the federal courts and on the other hand that the same legislative enactment is effective to waive the sovereign immunity by implication in tribal courts.

McCormick v Election Committee of the Sac & Fox Tribe, Okla Trib 8, 20; WL 128844 (Sac & Fox CIO 1980). This court is persuaded by the tribal court's reasoning in *McCormick* that ICRA does not waive tribal sovereign immunity.

For all of the foregoing, this court finds that federal law recognizes the inherent immunity of tribal governments and their subordinate enterprises and that there has not been any express abrogation of that immunity by Congress. Having found that Congress has not waived tribal sovereign immunity, the question becomes whether or not the Tribe itself has waived immunity to allow a suit in this case. Article XVIII of the Little Traverse Bay Bands of Odawa Indians Constitution provides that "[t]he Little Traverse Bay Bands of Odawa Indians, including all subordinate entities, shall be immune from suit except to the extent that the Tribal Council clearly and expressly waives its sovereign immunity. . . ." The court finds no clear or express waiver of sovereign immunity in the tribal constitution or statutes to allow the plaintiff to sue the tribe in tribal court.

Exhaustion of Administrative Remedies

The court further finds that the assertion of the defense of sovereign immunity by the Tribe in this case has not been an absolute bar to plaintiff's petition for redress. The Tribe has provided an administrative process to address employee grievances through the

Employee Review Board. The court must conclude that the LTBB Tribal Council, in establishing an administrative process to resolve employee complaints, made a conscious choice about the appropriate forum for resolving employment disputes.

Due Process requires that employees have an opportunity to be heard in a forum available to them before which they can present their claims. Plaintiff was afforded an opportunity to participate in an Employee Review Board hearing to contest his termination. However, the plaintiff refused to sign the confidentiality agreement required of all participants. By refusing to follow Employee Review Board hearing procedures, the plaintiff, in effect, elected not to participate in the forum available to him to address his employment grievance. The Employee Review Board was ready and willing to hear the plaintiff's grievance, but he made a decision which prevented the hearing from proceeding.

Whistle Blower Protection

The plaintiff agrees with defendant casino that the WBPS does not allow him to bring suit against the Tribe, but only the individual named fellow employees, Defendants Eckholm and Espinosa. The plaintiff maintains that the reasons Mr. Eckholm gave for his termination from casino employment are not legitimate. Mr. Carey believes he was terminated because he disclosed information to a tribal council member regarding irregular accounting practices costing the Tribe lost profits. Mr. Carey believes this was a bad management decision but agrees that it does not rise to the level of illegal activity.

Defendant casino argues that Mr. Carey has failed to identify the reporting of any unlawful activity to the tribal council member, therefore, his cause of action under the WBPS must also fail. The court agrees.

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CONCLUSION

The Court adopts the arguments made by Defendant Victories Casino and finds that Plaintiff Albert Carey has failed to state a claim upon which relief can be granted. The plaintiff cannot sue the defendant casino because it has not waived sovereign immunity. Further, the plaintiff failed to exhaust all administrative remedies made available to him by the defendant. In addition, the Tribe's WPBS does not allow the plaintiff to sue the defendant casino, but only employees of the casino. However, the plaintiff has failed to identify the reporting of unlawful activity necessary to establish a claim under the WPBS against Defendants Espinosa and Eckholm in their individual capacities. For all of the foregoing reasons, the Court grants defendant's motion for summary judgment and dismissal.

Date: April 20, 2006

Jenny Lee Kronk
Tribal Judge